No. 10514

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH ALEXANDER,

Plaintiff and Appellant,

vs.

LT. GEN. JOHN L. DEWITT and R. B. HOOD, Special Agent in Charge of Federal Bureau of Investigation, United States Department of Justice, at Los Angeles, California,

Defendants and Appellees.

APPELLANT'S OPENING BRIEF.

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Defendants and Appellees.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdictional Pleadings and Facts.

On or about the 27th day of February, 1943, appellant received a letter on the letterhead of Headquarters Western Defense Command and Fourth Army, Individual Exclusion Board, Presidio of San Francisco, California, signed by Randell Larson, Lt. Col. F. A., Recorder, notifying the said appellant that a Board of Officers would convene on Thursday, the 11th day of March, 1943, at the hour 1:30 P. M. at 458 South Spring Street, Los Angeles, California, for the purpose of considering whether military necessity required that this appellant be ordered excluded from certain military areas of the Western De-

fense Command, a copy of which notification, marked "Exhibit E", is attached to plaintiff's complaint and found at pages 23-25 of Transcript of Record. Attached to said notification there were no charges against the plaintiff, and the notification stated that while he might be accompanied by counsel, the counsel would not be heard by the Board nor would be permitted to examine witnesses.

The notification further proceeded to violate every regulation of the Amendments to the Constitution of the United States as to the plaintiff being given a chance to protect himself by due process of law, nor was there any intimation therein that the proceeding would be conducted so that the defendant would be advised as to the charges against him, know who his accusers were and have the right to face them, hear their testimony or have the right, by attorney or in person, to cross-examine them. The notice further stated that the plaintiff was not charged by the notification in question with any penal offense.

Thereafter appellant was informed that the so-called Individual Exclusion Board would meet in the Biltmore Hotel in the City of Los Angeles;

Thereafter, on the 14th day of April, 1943, the appellant received a communication entitled "Individual Exclusion Order" signed by John L. DeWitt, Lieutenant General, U. S. Army Commanding, excluding him from entering into Military Areas Nos. 1 and 2, comprising the states of Arizona, California, Oregon and Washington, in accordance with Public Proclamation Nos. 1 and 2, dated March 2, 1942, and March 16, 1942, respectively, and notifying him that the present action was dictated by military necessity, and that within forty-eight hours after service upon him of this order he was required to take his de-

parture from said premises, a copy of which order, marked "Exhibit F", is attached to plaintiff's complaint and found at pages 26-28 of Transcript of Record.

Thereafter, plaintiff-appellant on or about May 7, 1943, filed a Complaint for Preliminary Injunction and for Damages in the United States District Court, in and for the Southern District of California, Central Division, against Lt. Gen John L. DeWitt and other defendants named in said action, a copy of which complaint is set forth at pages 2-28 inclusive of Transcript of Record.

Thereafter, on May 11, 1943, plaintiff-appellant filed a Notice of Motion for Injunction *Pendente Lite* against all persons who had been named in the Complaint hereinabove referred to, seeking an Order enjoining said defendants, and each of them, *pendente lite,* from executing, or causing to be executed, those certain orders denominated in plaintiff-appellant's Complaint as Exclusion Order dated April 14, 1943, a copy of which Notice of Motion is set forth at page 29 of Transcript of Record.

Thereafter, and on May 24, 1943, the United States Attorney, on behalf of Lt. Gen. John L. DeWitt and R. B. Hood, defendants who had been served in the action, appeared and filed in the said United States District Court a Notice of Motion and Motion to Deny Plaintiff's Application for a Motion *Pendente Lite* and to Strike Certain Portions of Plaintiff's Complaint, and to Dismiss Plaintiff's Complaint, a copy of which Notice of Motion and Motion is set forth at pages 30-32 inclusive of Transcript of Record.

On or about May 25, 1943, a hearing was had on said Motion before Honorable Peirson M. Hall, Judge presiding, at which time the Court ordered Items B-1, 2, 3, 5, 6,

7 and 8 of the Government's motion to strike from the complaint denied, and granted the motion to strike Item B-4 in part, and denied it in part, and ordered that Items 9 and 10 be granted on motion of plaintiff, and ordered paragraph 4 of the prayer of the complaint stricken on motion of plaintiff. That at said hearing the Court further ordered that the Motion for Injunction *Pendente Lite* be denied, and the complaint dismissed, counsel for plaintiff to prepare judgment of dismissal. [Transcript of Record, pp. 32-34, incl.]

Thereafter, on or about June 15, 1943, a Judgment was signed in which said action was dismissed as to said defendants Lt. Gen. John L. DeWitt, and R. B. Hood, on the ground that plaintiff's complaint did not state facts sufficient to constitute a cause of action, a copy of which Judgment is set forth at pages 35-37 Transcript of Record.

From this Judgment plaintiff-appellant appeals to the above-entitled Court.

Statement of Case.

This appeal is based upon the sworn Complaint filed in Action No. 2909-PH in the United States District Court in and for the Southern District of California, Central Division, by plaintiff-appellant Kenneth Alexander [Transcript of Record pp. 2-28, incl.] and upon the Government's pleadings in response thereto [Transcript of Record pp. 30-32, incl.], and upon the Government's Exhibits, the originals of which have been forwarded to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, pursuant to Stipulation *re* Exhibits. [Transcript of Record p. 41.]

Since the Government's pleadings have not denied any of the facts set forth in plaintiff's complaint, we are entitled to rely upon the facts set forth in said complaint, including the exhibits attached thereto, and upon the exhibits of defendants offered herein and forwarded to the Clerk of the Circuit Court as hereinabove referred to.

According to Executive Order No. 9066, dated February 19, 1942 [Appendix Exhibit A-1] the defendant, Lt. Gen. John L. DeWitt, as Military Commander of what is known as the Western Defense Command, was instructed by the President of the United States as follows:

> "I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies."

This Proclamation was in force and effect on February 27, 1943.

At that time the plaintiff-appellant was a commercial photographer; a citizen of the United States and engaged in a specialty connected with his business in the City of Los Angeles, State of California.

Plaintiff-appellant had, in order to serve his country, enlisted in the United States Army at Schofield Barracks, T. H., on August 27, 1917, and was subsequently honorably discharged on account of physical disability [Transcript of Record pp. 3, 4].

Plaintiff-appellant re-enlisted in the United States Navy on April 9, 1918, at Washington, D. C., and served a four year enlistment, until honorably discharged on April 18, 1922, as chief photographer P. A. in New York City. [Par. 2, Plaintiff's Complaint; Tr. of Record p. 4.]

That on the 8th day of December, 1941, following the attack on Pearl Harbor, the plaintiff-appellant addressed a communication to Headquarters Air Force, Washington, D. C., making inquiry regarding his application already on file for enlistment in the Air Force of the United States Army [Transcript of Record p. 5] a copy of his application is attached to plaintiff's complaint and marked "Exhibit B" of said complaint. [Transcript of Record pp. 20, 21.]

That thereafter, not receiving an answer to his letter, he voluntarily enlisted in the United States Navy in Los Angeles on May 31, 1942, and served as a chief photographer P. A. until he was honorably discharged on September 25, 1942, from Pensacola, Florida, from which port he was returned to his home by the Navy and promptly reported to the Naval Intelligence Department of the United States Navy at Los Angeles and to the Federal Bureau of Investigation in said city, offering to make known to said organizations any information he had in his possession which would be of assistance to the United States Government. [Pars. III and IV of Complaint; Transcript of Record p. 5.]

That, not receiving a reply to his application, he entered employment at the Pacific Studios as a special commercial photographer and was regularly employed there until served with the notice and orders from Lt. Gen. John L. DeWitt, United States Army Commander.

That plaintiff-appellant represents that his only means of livelihood is to work at his profession, that of a photographer and photo technician. [Par. IV of Complaint; Transcript of Record p. 6.]

Plaintiff-appellant further shows that he has continuously maintained a legal residence in the United States and its territories since he became a citizen of the United States in the year 1915, having been originally a British subject, and has exercised his rights of franchise in different elections held in the United States during that time. [Par. III of Complaint; Transcript of Record p. 6.]

The complaint goes on to show the official standing of the various defendants, of whom only Lt. Gen. John L. DeWitt and R. B. Hood were served.

The records show that the following Executive Orders, Presidential Proclamations and Orders by Lt. Gen. John L. DeWitt which are material to this case were duly made and promulgated by the United States authorities, and are as follows:

First: Executive Order No. 9066, dated February 19, 1942 being an Order authorizing the Secretary of War to prescribe Military areas, which is attached to the appendix hereto and marked Exhibit "A-1".

Second: Extract from a letter from Hon. Henry L. Stimson, Secretary of War, to Commanding General DeWitt, dated February 20, 1942, which is attached to the appendix hereto and marked Exhibit "A-2".

Third: Public Proclamation No. 1, dated March 2, 1942, from the Presidio of San Francisco, California, by Lt. Gen. John L. DeWitt, which is attached to the appendix hereto and marked Exhibit "A-3".

Fourth: Public Proclamation No. 2, dated March 16, 1942, from the Presidio of San Francisco, California, by Lt. Gen. J. L. DeWitt, which is attached to the appendix hereto and marked Exhibit "A-4".

Fifth: Order signed by Secretary of War Hon. Henry L. Stimson, directed to Lieutenant General John L. DeWitt, dated July 15, 1942, attached to the appendix hereto and marked Exhibit "A-5".

That said Exhibits have been forwarded to this Honorable Appellate Court as part of the record in this case pursuant to stipulation, see page 41, Transcript of Record.

The complaint further shows that plaintiff-appellant is not a member of the Military Forces of the United States and is not subject to military law or control or orders of the officers of the United States Army or Navy [Complaint, par. X; Transcript of Record p. 12], and further:

That no martial law has been declared in the area from which, as will be hereafter shown, plaintiff-appellant was to be excluded by Military Order, or the area wherein plaintiff-appellant was to be confined. [Complaint, par. X; Transcript of Record p. 12.]

The complaint further shows that at all times the Courts in the State of California, State and Federal, have been open and have administered the same quality of justice heretofore meted out by them, and have been available to any party desiring to charge anyone of crime or wrongdoing. [Complaint, par. X; Transcript of Record p. 12.]

That on the 27th day of February, 1943, the Headquarters of the Western Defense Command and Fourth Army at the Presidio of San Francisco, California, issued a let-

ter or notice addressed to the plaintiff at 333 South Hope Street, Los Angeles, California, notifying him that a board of officers had been appointed by Commanding General, Western Defense Command and Fourth Army to consider whether military necessity required that he be ordered excluded from certain Military Areas of the Western Defense Command and other Defense Commands, and that the Board of Officers would be convened on Thursday, March 11, 1943, at the hour of 1:30 P. M. at Room 216 Rowan Building, 458 South Spring Street, in the City of Los Angeles, State of California, at which time he would be informed of the general nature and scope of the inquiry and afforded an opportunity to offer evidence in his own behalf and answer questions or make a statement under oath or affirmation. That all matters pertaining to the inquiry were confidential and plaintiff's appearance before the Board was optional on his part; that he might be accompanied by counsel as his personal advisor, but counsel would not be heard by the Board, nor would he be permitted to examine witnesses. A copy of said notice is attached to plaintiff's complaint and is found at pages 23-25 of Transcript of Record.

That thereafter, and on the 11th day of March, 1943, at the place and at the time indicated by said summons or communication as above set forth the plaintiff-appellant was notified that the said hearing would be held at the Biltmore Hotel in the aforesaid City of Los Angeles, where he was confronted by certain persons who were joined in this suit as defendants Doe 1, Doe 2 and Doe 3; that said persons representing themselves to be a board of inquiry, made inquiries in detail into plaintiff's occupation and relative to his activities in political organizations and as to his politics and as to his religion, and inquired of

plaintiff if he possessed any psychic power by which he communicated with different parties in the United States.

That plaintiff was denied an opportunity to acquaint himself with or to examine any information in possession of the Board which might have been detrimental to his interest, nor was he advised that the Board had any information of that character.

That plaintiff was advised that much of the information about which they made inquiry was based upon rumor which had been communicated to the Board by parties unknown to plaintiff and whose identity the Board refused to make known to plaintiff.

That plaintiff was not given an opportunity to be confronted by witnesses against him, if there were any, and if there were any such witnesses their testimony was taken without affording plaintiff an opportunity to be present at the taking of such testimony or to cross-examine such witnesses or to otherwise and in any manner or form to refute any such testimony.

That plaintiff was without counsel and was not permitted in any way to participate in said proceeding except to answer questions and interrogatories that were propounded to him. [Complaint, par. VI; Transcript of Record pp. 7-9.]

That thereafter, and on the 21st day of April, 1943, plaintiff was served with a copy of an Individual Exclusion Order No. 1K-7, dated April 14, 1943, a copy of which said Individual Exclusion Order is attached to plaintiff's complaint and is found at pages 26-28 of Transcript of Record.

That the said Exclusion Order No. 1K-7, purported to exclude plaintiff within ten days from the date of service

of said order from the States of California, Arizona, Oregon, and Washington on the West Coast of the United States, and also to exclude the plaintiff-appellant from the date of service of the order from the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, the District of Columbia, and a part of the State of Florida, as defined and designated by Proclamation No. 1, dated May 16, 1942, Headquarters Eastern Defense Command and First Army, Governor's Island, New York, H. A. DRUM, Lt. Gen. United States Army, Commanding; and from entering into, being in or remaining in, from and after said date, Military Area No. 1 of Florida, Military Area No. 1 of Alabama, Military Area No. 1 of Mississippi, Military Area No. 1 of Louisiana, Military Area No. 1 of Texas and Military Area No. 1 of New Mexico, as defined and designated by Public Proclamation No. 1, dated May 30, 1942, Headquarters Southern Defense Command, San Antonio, Texas, WALTER KREUGER, Lt. Gen., United States Army Commanding. [Complaint, par. VII; Transcript of Record pp. 9-10.]

That plaintiff applied in writing to the defendant Lt. Gen. John L. DeWitt on April 28, 1943, requesting and petitioning that said defendant cancel said Order of Exclusion, or to extend the time to a period longer than 10 days, and requested that the United States Government furnish to the plaintiff compensation equal to that which he could earn at his trade or profession until such time as he could secure employment in his profession, and further petitioned and requested of said defendant that the United States Government furnish him with support and

sustenance until such time as he could secure employment in the event the Order of Exclusion was carried out and plaintiff was sent to some section of the United States where he was without friends or acquaintances, and plaintiff was advised by the defendant, L. G. WHITE, Investigator for Headquarters Western Defense Command and Fourth Army, on April 30, 1943, that his petition was wholly denied. [Complaint, par. VIII; Transcript of Record pp. 10-11.]

Plaintiff further alleges in said complaint, and it is not denied, the following:

> "Plaintiff at all times since residing in the United States and its territories has conducted himself as a respectable and law-abiding citizen; that he has never been charged with a violation of the penal laws of the United States or any of the states or territories within the United States; that by reason of plaintiff's conduct, he has established a reputation for honor, truth and veracity and is a peaceable, law-abiding American citizen; that the Order of Exclusion, referred to as Exhibit 'F', in effect convicts plaintiff of being disloyal to the United States and publishes to the world that he is disloyal and a dangerous citizen to the extent that he is not permitted to reside in the United States except at those places designated by the defendants; that the information upon which the Order of Exclusion was issued was and is wholly false; that no ground or basis exists for such an order, and that this fact can and will be established by competent legal evidence if the plaintiff is given an opportunity to present witnesses and to have a hearing or a trial before this Honorable Court." [Complaint, par. IX, Transcript of Record pp. 11 and 12.]

The plaintiff-appellant further charges that since April 14, 1943, the defendants-appellees, including the defendants who were served in this case, have enforced and are enforcing said orders at the present time, and they have threatened and intend to carry out and enforce said orders and each of them and will, unless restrained from so doing by order of this Court, carry out and execute each of said orders.

Brief Statement of Questions Involved in the Appeal.

First.

WERE THE ALLEGATIONS SET FORTH IN PLAINTIFF-APPELLANT'S COMPLAINT SUFFICIENTLY PLEADED TO ENTITLE HIM TO THE REMEDY PRAYED FOR, OR TO ANY REMEDY TO BE GRANTED BY THE UNITED STATES COURTS?

Second.

WAS THE MILITARY TRIBUNAL WHICH TRIED PLAINTIFF-APPELLANT, AND ENTERED AN ORDER DEPORTING HIM FROM THE WESTERN DEFENSE COMMAND, A COMPETENT TRIBUNAL TO PERFORM SUCH ACTS?

Third.

DOES PLAINTIFF-APPELLANT'S MOTION FOR INJUNCTION PENDENTE LITE, TOGETHER WITH HIS OTHER PLEADINGS IN SAID CAUSE OF ACTION, ENTITLE SAID PLAINTIFF-APPELLANT TO A TEMPORARY INJUNCTION RESTRAINING THE DEFENDANTS FROM ENFORCING THE ORDER OF THE MILITARY TRIBUNAL PENDING THE TRIAL OF THIS SUIT?

ARGUMENT.

POINT I.

That the Court Erred in Dismissing the Complaint of the Plaintiff-Appellant Wherein He Prayed for an Injunction and Damages Against the Defendants-Appellees Herein.

It must be remembered that the plaintiff-appellant filed a complaint in the District Court of the United States, in and for the Southern District of California, Central Division, wherein he prayed that the Court take jurisdiction of the facts set forth in the complaint, as the same was founded upon a Federal question arising under the Constitution of the United States. [Complaint, par. I; Transcript of Record pp. 2-3.]

The complaint further alleged that plaintiff-appellant was a naturalized citizen of the United States of America, born in London, England, and, desiring to serve the country of his adoption, had enlisted in the United States Army at Schofield Barracks, T. H., on August 27, 1917 and was subsequently honorably discharged on October 16, 1917, on account of physical disability. These facts are not contradicted by these defendants-appellees or their attorney, the United States Attorney, and, therefore, in considering this appeal they must be taken as proved.

The complaint of the plaintiff-appellant further alleged that this plaintiff-appellant had at divers times, both in peace and war, served in the Army and Navy of the United States and had always been honorably discharged. [Transcript of Record pp. 3-6.] These allegations are not disputed by the defendants-appellees or their counsel and, therefore, must be considered as proved.

The complaint further alleged that plaintiff-appellant's only means of livelihood is working at his profession as a photographer and photo technician, and that he has continuously maintained a legal residence in the United States and its territories since he became a citizen of the United States in the year 1915, and has exercised his right of franchise in different elections held in the United States during said time. These allegations are also uncontradicted and, therefore, must be taken as true and proved.

It is further uncontradicted by the defendants-appellees or their counsel, and therefore, must be considered as proved, that plaintiff-appellant secured employment at his profession as a photographer at the Pacific Studios, in the City of Los Angeles, County of Los Angeles, State of California, and has been regularly employed there until served with notices and orders from Lt. Gen. John L. DeWitt, United States Army Commander, as hereinafter set forth.

The complaint further alleged that Lt. Gen. John L. DeWitt is the Commanding General of the United States Army of the Western Defense Command and Fourth Army, comprising an extended area along the Pacific Coast of the United States, and the headquarters and residence of said Lt. Gen. John L. Dewitt are at Presidio, San Francisco, California.

That, further, defendant R. B. Hood is a Special Agent of the United States Department of Justice located at Los Angeles, California. These allegations are not denied and, therefore, must be taken as proved.

The complaint further names a number of other defendants, none of whom had been served at the time this complaint was argued before the United States District

Judge and, therefore, the motion of dismissal was granted only as to these two defendants who now are defendants-appellees.

The complaint further alleged that each of the defendants named in the complaint, including R. B. Hood, was under the order and control of the defendant-appellee Lt. Gen. John L. DeWitt. These allegations are not denied and, therefore, must be taken as proved.

The complaint further alleged as follows:

> "Defendant R. B. Hood is a Special Agent in Charge of the Federal Bureau of Investigation of the United States Department of Justice located at Los Angeles, California.
>
> "Defendant L. G. White is an Investigator for the Headquarters of the Western Defense Command. Fourth Army of the United States, stationed at Los Angeles, California.
>
> "Defendant L. F. Sloan is the Supervising Officer in charge of the War Relocation Authority at Los Angeles, California.
>
> "Upon information and belief the plaintiff alleges that each of said defendants is under the orders and control of the defendant Lt. Gen. John L. DeWitt."

The complaint further alleges as follows:

> "On February 27, 1943, defendant Randell Larson, Lt. Col., F. A., acting under the orders and control of Lt. Gen. John L. DeWitt, caused to be executed an order signed by him in his capacity as an officer of the Headquarters of the Western Defense Command and Fourth Army in charge of the Individual Exclusion Hearing Board, addressed to the plaintiff, advising plaintiff that on Tuesday, March

11, 1943, at 1:30 P. M. at room 216, Rowan Building, 458 South Spring Street, Los Angeles, California, an inquiry would be made at said time and place, and requesting the plaintiff to advise at least 24 hours prior to the time of hearing if he intended to appear. Copy of said communication is attached hereto, made a part hereof, and marked Exhibit 'E'. Said communication advised plaintiff that he might be accompanied by counsel to act as his personal advisor, but he was advised that any counsel who might represent him would not be heard by the Board and that said counsel would not be permitted to examine witnesses. The communication also advised that the inquiry by the Board was in no sense a criminal proceeding and that plaintiff was not charged by the communication with any penal offense.

"That on March 11, 1943, at the place and at the time directed in said summons or communication, plaintiff appeared before the so-called Individual Exclusion Hearing Board and was advised that said hearing was to be held in a room at the Biltmore Hotel; that thereafter and forthwith the plaintiff went to a room in the Biltmore Hotel in the City of Los Angeles, California, as directed, where he was confronted by defendants Doe One, Doe Two and Doe Three. Said parties required plaintiff to take oath as to all recitals made by him. The said Board representing themselves to be a board of inquiry, made inquiries in detail into plaintiff's occupation and relative to his activities in political organizations, and as to his politics and his religion, and inquired of plaintiff if he possessed any psychic power by which he communicated with different parties in the United States.

"Plaintiff was denied an opportunity to examine any information in possession of the Board which might have been detrimental to his interest, nor was he advised that the Board had any information of that character. Plaintiff was advised that much of the information about which they made inquiry was based upon *rumor* which had been communicated to the Board by parties unknown to plaintiff and whose identity the Board refused to make known to plaintiff. Plaintiff was not given an opportunity to be confronted by witnesses against him if there were any, and if there were any such witnesses their testimony was taken without affording plaintiff an opportunity to be present at the taking of such testimony or to cross-examine such witnesses or to otherwise and in any manner or form to refute any such testimony. Plaintiff was without counsel and was not permitted in any way to participate in said proceeding except to answer questions and interrogatories that were propounded to him."

The complaint further alleged as follows:

"That on April 21, 1943, plaintiff was served with a copy of an Individual Exclusion Order No. 1K-7, dated April 14, 1943. A copy of said Individual Exclusion Order is attached hereto, made a part hereof and marked Exhibit F. Said Individual Exclusion Order No. 1K-7 purports to exclude plaintiff within ten (10) days from date of service of said order from the States of California, Arizona, Oregon and Washington on the West Coast of the United States, and also excludes plaintiff from date of service of the order from the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Dela-

ware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, the District of Columbia, and a part of the State of Florida, as defined and designated by Proclamation No. 1, dated May 16, 1942, Headquarters Eastern Defense Command, First Army, Governors Island, New York, H. A. DRUMM, Lt. Gen., United States Army, Commanding; and from entering into, being in or remaining in, from and after said date, Military Area No. 1 of Florida, Military Area No. 1 of Alabama, Military Area No. 1 of Mississippi, Military Area No. 1 of Louisiana, Military Area No. 1 of Texas and Military Area No. 1 of New Mexico, as defined and designated by Public Proclamation No. 1, dated May 30, 1942, Headquarters Southern Defense Command, San Antonio, Texas, WALTER KRUEGER, Lt. Gen., United States Army, Commanding."

The complaint further alleged that plaintiff-appellant applied in writing to the defendant-appellee Lt. Gen. John L. DeWitt on April 28, 1943 (and before the date set for the execution of Military Order set forth above) requesting and petitioning said John L. DeWitt, as Lt. Gen. and in charge of the proceedings against this plaintiff-appellant to cancel said Order of Exclusion or to extend the time to a period longer than ten days and that he received no answer thereto; and that since April 14, 1943 the defendants-appellees have enforced, and are enforcing at the present time, and they have threatened and intend to carry out and enforce said Orders and each of them, and will, unless restrained from so doing by an order of the United States District Court, carry out and execute each of said orders. These allegations in the complaint are not denied by the defendants-appellees, or by their counsel, and, therefore, must be taken as true and proved.

The complaint of the plaintiff-appellant further alleged as follows:

"1—*The Exclusion Order.*

"The Order of Exclusion aforesaid has the effect of completely prohibiting the plaintiff from practicing his present occupation for the reason that at the present time there are no opportunities for the plaintiff to follow his said occupation as a photographer and photo technician in any community outside of the Western Defense Command, and from all of said area plaintiff is by said Order excluded. That said Order of Exclusion will make it impossible for the plaintiff to secure employment in his profession or trade; that the plaintiff is an experienced photographer and photo technician, has earned and is capable of earning a salary of $200.00 or more per week; that the enforcement of said Order will deprive the plaintiff of the right to follow his profession to earn a livelihood.

"Additionally the enforcement of said Order will abridge the constitutional rights of the plaintiff, including:

"a—The right of the plaintiff to freedom of religion, freedom of speech, freedom of the press, freedom of assemblage, and the right to petition the Government for a redress of grievance.

"b—The plaintiff's right to a fair and full hearing, to be informed of the nature or cause of any accusation against him, to a presentment or an indictment of a grand jury, to a public trial, to a trial by jury, and to counsel.

"c—The right of the plaintiff to establish and maintain a home, the right to free movement; and the right to equality of treatment under the law and to

be free from discrimination and persecution solely because of his religious and economic views; said rights and each of them are of a value in excess of $3,000.00, exclusive of interest and costs.

"The restraint imposed upon the plaintiff by virtue of said letter order has up to the present time resulted in damage to the plaintiff in a sum in excess of $3,000.00 and costs; and the continuing enforcement of said orders will result in further damage to this plaintiff.

"Additionally, the plaintiff has been damaged in a sum in excess of $3,000.00, exclusive of interest and costs, because said letter order constitutes an abridgment of the rights of the petitioner as guaranteed by the United States Constitution.

"That plaintiff has already suffered irreparable injury by the enforcement by the defendants of the orders aforesaid, and will continue to suffer irreparable injury by virtue of the enforcement of said orders, unless said enforcement is restrained by orders of this court. Plaintiff does not have an adequate remedy at law.

"The acts of the defendants aforesaid, and the threatened acts of the defendants as hereinbefore stated have abridged and threaten to abridge, respectively, the following constitutional rights of the plaintiff:

"1—*The First Amendment*—The right of the plaintiff to freedom of religion, freedom of speech, freedom of the press, freedom of assemblage, and the right to petition the Government for a redress of grievances.

"2—*The Fifth Amendment*—The rights to liberty and property and more particularly, the right to

earn a livelihood and engage in his profession or trade, the right to establish and maintain a home, the right to free movement; and the right to equality of treatment under the law and to be free from discrimination and persecution solely because of religious and economic views.

"3—*The Sixth Amendment*—The rights to a fair and full hearing, to be informed of the nature or cause of any accusation against him, to a presentment or an indictment of a grand jury, to a public trial, to a trial by jury, and to counsel."

For a fuller and more complete statement of the allegations set forth by the plaintiff-appellant in his complaint, counsel refer to the complaint [as set forth in Transcript of Record pp. 2-28.]

The uncontradicted pleadings show that the plaintiff-appellant is a citizen of the United States, residing in the State of California, a civilian not attached in any way to either the Military, Naval or Defense Forces of the United States, and entitled to all the rights and privileges accorded him under the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. His record is absolutely clean as to any matter that could be considered dangerous to the public of the United States or any citizens of California in the present war which the United States is waging against Japan, Italy and Germany.

At no time has the Military Command, of which Lt. Gen. John L. DeWitt is the head and R. B. Hood is the

representative of the Prosecution Department of the United States Government been in command of any portion of the United States in which martial law had been declared, nor at any time during which either Lt. Gen. John L. DeWitt or R. B. Hood held office had the Federal or State Courts of California and of the Southern District, Central Division, ceased to function in their usual and proper course of hearing any charges, both criminal and civil, against citizens for violation of law; and at the time the orders set forth in said complaint were made, both the Federal Court and Supreme Court of the State of California were properly functioning with full control of all the rights given them by the State of California and the laws of the United States to govern and control any charge made against civilian citizens residing within the jurisdiction of said courts.

There is no evidence before the Court that at any time the plaintiff-appellant was guilty of any criminal or civil offense against the state laws or the laws of the United States. On the other hand, the entire record before this Court shows that not only has the plaintiff-appellant done his full duty as a civilian citizen of the United States, but he has served loyally and honorably in the United States Armed Forces in peace and war and during two wars in which the United States was engaged.

There is no allegation whatsoever, and it is distinctly denied by the pleadings before the Court, that this plaintiff-appellant in any hearing which he was given was accorded the speedy and public trial declared to be his right

under the Sixth Amendment to the Constitution of the United States, and it is likewise shown by the pleadings that the only actions against this plaintiff-appellant were arbitrary actions by a Military tribunal setting itself up in derogation of the rights of the United States Federal Courts and the protection given to the citizens of the United States by the Bill of Rights, set forth in the Amendments to the United States Constitution.

The United States Courts have had no hesitancy in declaring, in many trials and on many occasions, that, where the officials of a Federal Executive Department have acted in excess of the jurisdiction granted them, or in violation of the Constitution of the United States, the United States Court will enjoin them from carrying out the orders which they have so made.

In support of these statements, counsel respectfully submit the following decisions:

Goltra v. Weeks, 271 U. S. 536 (1926) (Army Officials enjoined);

Lane v. Watts, 234 U. S. 525 (1914) (Secretary of Interior enjoined);

Perkins v. Elg, 307 U. S. 325 (1939) (Secretary of Labor enjoined);

U. S. v. Nourse, 9 Pet. (U. S.) 8 (1835);

Houston v. Ormes, 252 U. S. 469 (1920);

Lipke v. Lederer, 259 U. S. 557.

(in each of the above, Treasury Officials enjoined).

Injunction Is the Appropriate Remedy to Challenge Illegal Action by Officials of a Federal Executive Department.

Waite v. Macy, 246 U. S. 606;

Work v. Louisiana, 269 U. S. 250 (1925).

The Courts Have the Duty and Authority to and They Will Adjudicate the Validity of Military Orders.

1—The judicial power is lodged exclusively in the Courts of the United States.

U. S. Constitution, Art. III, Sec. 1.

2—The limits of military discretion are to be determined by the Courts.

Ex parte Quirin, 87 L. Ed. (Advance Opinions) 1;

Ex parte Milligan, 4 Wall. 2;

Ex parte Orozco, 201 Fed. 106, at pages 110-118.

What are allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.

Sterling v. Constantin, 287 U. S. 378.

The Minimum Requirements of Due Process Contemplate at Least a Fair Hearing.

U. S. ex rel. Vajtauer v. Commissioner of Immigration, 273 U. S. 103 at p. 106;

Truax v. Corrigan, 257 U. S. 312, at p. 332;

Hurtado v. California, 110 U. S. 516, at pp. 534-535;

Holden v. Hardy, 169 U. S. 366, at p. 389;

Palko v. Conn., 302 U. S. 319, at p. 327;

Hansberry v. Lee, 311 U. S. 32;

Snyder v. Mass., 291 U. S. 97, at pp. 105-106;

Powell v. Ala., 287 U. S. 45, at pp. 67-68 (1932);

Ohio Bell Telephone Company v. Public Utilities Commission, 301 U. S. 292, at p. 304;

Railroad Commission of California v. Pacific Gas & Electric Co., 302 U. S. 388, at p. 393;

Morgan v. U. S., 304 U. S. 1, 14.

Plaintiff-appellant was a civilian citizen following his occupation in a lawful and legal manner according to the uncontradicted pleadings before this Court. His right so to do without unreasonable abridgment of the rights set forth in the Amendments to the Constitution of the United States under "Due Process of Law" has been well settled:

Allgeyer v. Louisiana, 165 U. S. 578;

Meyer v. Nebraska, 262 U. S. 390, at p. 399;

Edwards v. California, 314 U. S. 160, at pp. 182-185.

POINT II.

That the Military Tribunal Which Took Upon Itself to Try and Convict Plaintiff-Appellant, and Which Ordered Him Out of the Western Defense Command Was Not Competent so to Do Especially, in View of the Fact That by the Terms of Its Own Documents It Excluded the Plaintiff-Appellant From the Protection of All of the Rights Given to Every American Citizen by the Amendments to the United States Constitution Commonly Known as the "Bill of Rights."

There is no question but that the plaintiff-appellant could have been tried and punished by the ordinary civil tribunals if he had violated any law.

These civil tribunals—both State and Federal—have always been open in the State of California and in the jurisdiction of the United States District Court for the Southern District, Central Division. Their regular proceedings have not been interrupted and their processes have been regularly executed. This Court will take judicial notice of these facts, and certainly must take judicial notice that the sittings of the said Courts have ever been, and now are, uninterrupted.

Nothing in the allegations made by the United States Attorney as counsel for the defendants-appellees, or set forth in the so-called Military Orders or in the complaint of the plaintiff-appellant, even suggested that the regular course of justice was or ever had been, impeded. All that the Military Orders pretended was that any acts

charged against the plaintiff-appellant were done during a period of war, and that military necessity required that he be ordered excluded from certain military areas of the Western Defense Command, the Southern Command and the Eastern Command, because military necessity required that he be removed from said zones.

The plaintiff is a simple citizen, not belonging to the Army or Navy or holding any official position, and not connected in any manner with the public service. He is in the position of every other citizen who might fall under suspicion.

The evidence against the plaintiff is not stated in the Military Orders and is immaterial. His guilt or his innocence does not affect the question of the competency of the tribunal by which he was judged.

What he disputes, and what his counsel dispute, is the jurisdiction of the Military Tribunal to decide the issues of guilt or innocence.

What is a Military Tribunal? Is it a body known to the laws? Is it a Court Martial under another name? All we know is that it is a board of military officers convened by a military commander under color of military authority.

Has this board any sanction, as a judicial body, from any Act of Congress? We have not found any such power.

It is claimed that it has power under Executive Order No. 9066, dated February 19, 1942, to consider whether military necessity requires that a citizen be ordered excluded from certain military areas.

There being no Act of Congress for the establishment of the tribunal, it depends entirely upon the executive will for its creation and support.

This brings up the true question now before the Court: Has the President in time of war, by his own will and judgment of the military, power to bring before the military officers any citizen, man or woman, in the land to be there subjected to trial and punishment by said Military Tribunal?

If the President has this lawful power, from whence does he derive it? From the Constitution? It cannot be found there. He can exercise no power whatsoever but that which the Constitution of the country gives him. Beyond it, he has no more power than any other citizen. Our system knows of no authority beyond or above the law.

We may, therefore, dismiss from our minds every thought of the President having any prerogative as the representative of the people or as an interpreter of the popular will. He is selected by the people to perform those functions and those only which the Constitution of his country and the laws, made pursuant to that Constitution, confer.

The powers and attributes of the presidential office are in the Second Article of the Constitution.

First: He shall be the chief executive.

Second: He is Commander-in-Chief of the Army and Navy of the United States and the Militia of the several states when called into the actual service of the United States.

Third: He is to take care that the laws be faithfully executed.

The executive power given him is the executive power of the United States. He is not clothed with any executive power except as he is specifically directed by some other part of the Constitution, or by an Act of Congress.

The President is to take care that the laws be faithfully executed. He is to execute the laws by the means, and in the manner which the laws prescribe; the laws provide not only WHAT is done, but the MANNER of doing it, and all these the President is to execute.

Does the authority making him the Commander-in-Chief of the Army and Navy and Militia of the States when called into Federal service permit him by proclamation to create a judicial body which shall have the rights of liberty over civilian citizens in places where the judicial authority has already been set up and is functioning?

Does the authority to command an army carry with it the authority to arrest and try civilians by military code?

These questions seem to be easily answered. To command an army, whether in camp, on the march, or in battle, requires the control of no other persons than the officers and soldiers.

It cannot be supposed that if Congress failed to provide the means of recruiting, the Commander-in-Chief could lawfully force civilians into the ranks of the armed forces.

What is called the "war power" of the President is nothing more than commanding the armies and fleets which Congress causes to be raised; to command these means to direct their operation.

There is no power in the Constitution whereby the President, by his mere will, can create military commis-

sions for the trial of persons not military for any cause whatsoever. The Amendments to the Constitution, which are known as the Bill of Rights, were passed for the state of war as well as peace. One has only to read them to know this is true. They were enacted to control military authority as well as the civil authority. The language is clear and unmistakable. There is no room left for interpretation.

If one should set himself to the task of expressing more clearly the intention to limit the military jurisdiction, he would find it hard to choose better words.

We contend that military tribunals for civilians, or non-military persons, are, whether in peace or war, inconsistent with the liberty of the civilian and can have no place in constitutional government, and our Supreme Court has repeated this doctrine in many cases.

Our approach to this case is one in substantial accord with the views of the Supreme Court as expressed at the time of a war three-quarters of a century ago:

> "The Constitution of the United States is a law for rulers and people, equally in war and peace and covers with the shield of its protection all classes of men, at all times and under all circumstances."
>
> *Ex parte Milligan,* 4 Wall., at p. 121.

In the case of *Sterling v. Constantin,* 287 U. S., page 378, is authority for the following proposition:

In that case the Court ruled (page 401):

> "What are the allowable limits of military discretion, and whether or not they have been overstepped in a *particular case,* are *judicial questions.*"

In the *Sterling* case the Court laid down the rule that a military measure is consistent with the Constitution if it is made:

i—In the face of an emergency,

ii—In good faith, and

iii—Is *"directly related"* to the emergency—that is, applied and enforced *in the particular case.*

The rule in the *Sterling* case follows and approves the criteria established in *Mitchell v. Harmony*, 13 Howard 115, 134, namely that in all cases in which military orders short-cut and eliminate judicial process, there must be a showing that "the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for."

The above is quoted in the *Sterling* case at page 401.

The Rudimentary Demands of Justice Incorporated Within the Concept of Due Process of Law, Make a Fair and Full Hearing Mandatory.

As was said in *Traux v. Corrigan*, 257 U. S. 312, *"This is the very essence of due process of law. . . ."*

The Existence of War Does Not Suspend the Constitution, Nor Abrogate the Bill of Rights.

The above has been made clear by the Supreme Court in *Ex parte Quirin, supra,* in which *Ex parte Milligan,* 4 Wall. 2, was followed and approved.

Compare also *United States v. Viereck,* United States Supreme Court, March 1, 1943, 87 L. Ed. (Advance Opinion) 529.

In a war case, *United States v. Cohen Grocery Co.*, 255 U. S. 81, at 88, while adjusting unconstitutional *wartime* Congressional action, the Court declared:

> "We are of opinion that the court below was clearly right in ruling that the decisions of this Court undisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon."

Citing *Ex parte Milligan* and many other cases, the Court concluded at p. 89:

> "It follows that, in testing the operations of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view."

Similarly, in *United States v. Bernstein,* 267 Fed. 295 at 296, in holding the Lever Act unconstitutional (held invalid by the Supreme Court in the *Cohen* case) the court held that when rights:

> ". . . guaranteed by the Constitution are invoked before this court no exigencies of war, or incidents, or aftermath of war, can justify their denial. The validity of war measures must equally stand the test of constitutional limitations and must fall, if rights guaranteed by the fundamental law are infringed or taken away."

Casserly v. Wheeler, 282 Fed. 389, at 393 (9th Cir.), took the same view.

> "It is urged that this arrest was made at the high tide of the prosecution of the war, . . . This is

all very true; but the civil law had not been suspended . . . The constitutional right of the citizen not to be deprived of his liberty without due process of law . . . was just as secure to the citizen at the time of the plaintiff's arrest as at any time since the organization of the government."

Similarly in *Home Building and Loan Association v. Blaisdell,* 290 U. S. 398, at 426, the court ruled that the:

> "War power . . . is the power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. *But even the war power does not remove constitutional limitations safeguarding essential liberties."* (Emphasis ours.)

The Court, speaking through Justice Brandeis, recognized the paramount authority of the Constitution in war time equally as in peace time in *Hamilton v. Kentucky Distilleries,* 251 U. S. 146, at 156:

> "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations."

And in *Sterling v. Constantin, supra,* at page 398, the court pointed out that even as to the military authorities, "there is no such avenue of escape from the paramount authority of the Federal Constitution."

In *Thornhill v. Alabama,* 310 U. S. 88, at 95-96, this Court definitely determined:

> "Mere legislative preference for one rather than another means for combatting substantive evils,

> therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations."

Ex parte Milligan, supra, and *Sterling v. Constantin,* 287 U. S. 378, are authority for the proposition that the constitutional test applicable to legislative enactments applies equally to military fiats.

> "Accordingly, upon a *prima facie* showing by the plaintiff of a denial, by virtue of a military order, of rights ordinarily guaranteed by the Bill of Rights, *the burden shifts to him who seeks to justify such denial to support the order,* and to advance the reasons for the order. The duty then falls upon the courts to 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced.'" (Emphasis ours.)

If these decisions did not constitute the law of the land as a true definition of the rights of the citizen, given him by the United States Constitution, then the President would become, in time of war, an actual dictator. He could swallow up every other power in the State.

If any governor of any state or any state legislature, or any of the courts of the states should stand in his way, the military tribunal would be at hand to try, and the military organization to arrest and execute. No longer

would the courts of this country—and especially the Appellate Court of the land be sacred, for they would be answerable as individuals to the military tribunal like other civilians—for if the war power may judge one civilian, it may judge all civilians.

If this war power belongs to the commander-in-chief as commander of the whole army, it belongs to every other commander in his own sphere.

The governor of each state is as much a commander-in-chief of the state forces as the President is commander-in-chief of the national forces.

Freedom is the rule, restraint the exception; this is the import of the Court's decision in *Herndon v. Lowry,* 301 U. S. 242.

If the power to try civilians for violations of the law of the land is independent of the legislative power, or the judicial power, then who can say that we are living in "a Democracy rather than in a tyranny such as proclaimed and carried on by the dictators of Europe"?

The Supreme Court of the United States has not been hesitant in declaring that acts such as set forth in the petition of the plaintiff-appellant cannot be countenanced under our democratic form of government.

Chief Justice Chase—*Ex parte Milligan,* 4 Wallace, at page 132 says:

> "The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which here must be taken as

true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized, though merited, justice.

"The trial and sentence of Milligan were by military commission convened in Indiana during the fall of 1864. The action of the commission had been under consideration by President Lincoln for sometime, when he himself became the victim of an abhorred conspiracy. It was approved by his successor in May, 1865, and the sentence was ordered to be carried into execution. The proceedings, therefore, had the fullest sanction of the government. This sanction requires the most respectful and careful consideration of this court. The sentence which it supports must not be set aside except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress."

In the late case, *Sterling v. Constantin,* 287 U. S. 378, pages 402-403, the Supreme Court of the United States, in referring to the action of the Governor of Texas in proclaiming martial law in certain counties under the facts set forth in that case, was held improper and a

violation of the rights of a person to control his own property; the Court said:

> "The proposition is this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will;* and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power' . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."

POINT III.

Plaintiff-Appellant's Motion for Injunction Pendente Lite, Together With His Other Pleadings in the Case, Not Being Contradicted as to Facts, Should Have Entitled, and Does Entitle, Plaintiff-Appellant to a Temporary Injunction Restraining Defendants From Enforcing the Order of the Military Tribunal Pending the Trial of This Suit.

The right of this Court to interfere by injunction with a void or illegal order has been fully dealt with in the former portion of this brief.

To summarize the law as to the same, counsel ask permission to quote the following cases:

In *Waite v. Macy,* 246 U. S. 606, the syllabus asserts, *page 607:*

> The Board of General Appraisers may be enjoined from enforcing a rule promulgated by the Secretary of the Treasury which necessitates the exclusion of an imported tea.

Also, *Work v. Louisiana,* 269 U. S. 250, at page 251, where the Secretary of the Interior was enjoined by the State of Louisiana relative to its production of a swamp land claim under a State Act.

The Supreme Court has also enjoined the Secretary of War in regards to the disposal of a fleet of ships.

In *Lane (Sec. of Interior) v. Watts,* 234 U. S. at page 525, the syllabus states:

> The Secretary of the Interior and the Commissioner of the General Land Office may be enjoined

from casting a cloud on a title vested by an approved location of a grant.

The Court held—*Perkins v. Elg,* 307 U. S. page 325, that the granting of an injunction against the refusal by the Secretary of Labor to issue a passport to a person whose nationality was in dispute was the proper remedy.

It is the duty of the Court to adjudicate the validity of military orders.

A. The judicial power is lodged exclusively in the Courts of the United States.

United States Constitution, Art. III, Sec. 1.

B. The limits of military discretion are to be determined by the Courts.

Ex parte Quirin, 87 L. Ed. (Advance Opinions) 1;

Ex parte Milligan, 4 Wall. 2;

Ex parte Orozco, 201 Fed. 106.

"What are allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."

Sterling v. Constantin, 287 U. S. 378, at 401.

In the case at bar, the sworn complaint, the facts of which are uncontradicted, shows that the plaintiff-appellant had been ordered, on the 14th day of April, 1943, by military order to leave the State of California "within 48 hours after service upon him of this order."

It is further proved by the statements in plaintiff's complaint that the time had expired under the terms of the order, and that "the defendants have since April 14, 1943,

enforced, and are enforcing said orders at the peresent time, and they have threatened, and they intend to, carry out and enforce said orders and each of them; and will, unless restrained from so doing by order of this Court, carry out and execute each of said orders." [Complaint, Par. XIII, Tr. of Record, p. 14.]

The District Court should have assumed, and this Court must assume, that these allegations are true.

In the Military Proclamation of the President of the United States No. 9066, under which order the defendants-appellees are acting in this case, the President of the United States said:

> "I hereby further authorize and direct the Secretary of War and the said Military Commander to take such other steps as he, or the military commander, may deem advisable to enforce compliance with the instructions applicable to each area hereinabove authorized to be designated, including the use of Federal troops and also Federal agencies, with authority to accept assistance of state and local agencies." (See Exhibit "A-1" to Appendix of Brief, page 1.)

Therefore, the situation of the plaintiff-appellant at the time he made his application for an injunction *pendente lite* was precarious; the time within which he had been ordered to leave the State of California had passed; the President of the United States had instructed the defendants-appellees that they could use the Federal soldiers of the United States to enforce compliance with this order. After he had been seized by the Federal troops and taken from the State of California, a writ of habeas corpus, or any other proceeding, would have been to no avail.

We believe the best exposition of the law applicable to the facts in this case is contained in a recent opinion rendered by the Honorable J. Cullen Ganey, Judge of the District Court of the United States, for the Eastern District of Pennsylvania, in the case of *Olga Schueller v. H. A. Drum, Lieutenant General of the United States Army,* No. 3151.

In the *Schueller* case the situation was almost identical with that in the case at bar. While Judge Ganey's opinion represents the opinion of a District Court and is, of course, not binding as precedent upon a Circuit Court of Appeals, nevertheless we feel that the law is so well stated therein that this Court will find the opinion of great assistance. For that reason, we are copying Judge Ganey's complete opinion into this brief, as it is not available to this Court from other sources, as follows:

> "In the District Court of the United States, for the Eastern District of Pennsylvania.
>
> Olga Schueller v. H. A. Drum, Lieutenant General of the United States Army. No. 3151.
>
> Opinion (Filed Aug. 20, 1943)
>
> J. Cullen Ganey
>
> Ganey, J.: August 20, 1943.
>
> This is a petition for a declaratory judgment. The petition in substance, alleges that the petitioner is a naturalized citizen of the United States, residing in Philadelphia; that on or about December 23, 1942, upon the request of military authorities of the United States she voluntarily appeared before them and testified, in answer to questions propounded to her concerning her membership in various German clubs; that no charges were presented against her; that she only testified herself, and did not present the testi-

mony of others, nor did she offer any rebuttal of any information which may have been in the possession of the military authorities; that on April 26, 1943, Lieutenant-General H. A. Drum of the Eastern Defense Command and First Army of the United States issued and served upon her, allegedly under authority vested in him under Executive Order No. 9066, and pursuant to a determination made in accordance with provisions of paragraph 9A of Public Proclamation No. 2, Headquarters Eastern Defense Command and First Army, dated September 7, 1943, an individual exclusion order prohibiting her from entering or remaining in the eastern military area, which included the City of Philadelphia, after the expiration of ten days from the date of service, to wit: on and after twelve o'clock midnight Thursday, May 6, 1943; that it further advised her that failure to comply with the same would subject her to forcible expulsion and criminal penalty as provided by Public Law No. 503, approved March 21, 1942, 18 U. S. C. A. 974; that the petitioner is a loyal citizen of the United States, deriving her citizenship through the naturalization of her husband, and has been a resident of the United States for thirty-two years; that for the past year thereof she has been lawfully conducting a restaurant located in an industrial and commercial area in the City of Philadelphia; that her son, George Schueller, twenty years of age, enlisted in the United States Navy and being a minor, it was necessary to obtain petitioner's consent to said enlistment, which she readily gave; that she endeavored to ascertain the cause of her exclusion but was unable to obtain any information thereof, being advised that the facts were confidential; that no right of appeal exists from the said exclusion order and that compliance therewith, will result in the taking

of her property as well as deprive her of her liberty without due process of law. The petition was later amended to make Lieutenant-General Drum a party defendant, and the prayer of the petition amended to request a declaratory judgment—in substance that the exclusion order was unconstitutional, as being violative of the due process clause. The petition was later amended to allege that the matter in controversy involved more than three thousand dollars ($3,000), exclusive of interest and costs. The answer and amended answer denied that the controversy involved over three thousand dollars ($3,000); that the petitioner failed to allege facts entitling her to declaratory or other relief; denied that the exclusion order was unlawful and averred that the petitioner was excluded because military necessity so required; that by virtue of the authority vested in the President of the United States, the petitioner was ordered excluded upon investigative reports and recommendations and upon the determination, that military necessity and fact required such action and that the exclusion order was made in good faith and without personal bias or prejudice and was not arbitrary, capricious or unreasonable.

A temporary restraining order was granted by the court prohibiting the defendant from taking any action with respect to the petitioner until the matter was legally determined. At the hearing the matter was considered in the nature of a bill in equity, and testimony was taken by both sides showing the whole course of the proceedings.

The government presented certain witnesses to testify to the fact that the petitioner voluntarily appeared in Philadelphia at the request of the military authorities and was examined concerning the range

of her activities, and especially her membership in certain German clubs; that she called no witnesses in her behalf, but merely answered the questions propounded to her by army officers, comprising a Hearing Board; that the questions asked of the petitioner were based on investigative reports of the Federal Bureau of Investigation; that the testimony of the petitioner coupled with the investigative reports formed a basis of the Hearing Board's decision to recommend exclusion of the petitioner; that the whole file comprising the investigative reports and testimony of the petitioner was submitted to a reviewing officer and some fifteen other reviewing officers and Board of Review, including the United States Attorney, a specially designated representative of the Department of Justice, the Chief of Staff and finally the Commanding General of the Eastern Defense Command and First Army, Lieutenant-General Drum, who entered the order excluding the petitioner from the eastern defense area. It was further testified that a recommendation not to exclude, at any of the stages heretofore indicated, prevented the case from going forward and resulted either in its termination or further investigation. Testimony was also offered by the Assistant Chief of Staff of the Eastern Defense Command as a military expert on matters of military intelligence. He stated that the Eastern Military area was a sensitive military area consisting of forty per cent (40%) of the population of the United States and an even larger percentage of the alien enemy population and of the population of enemy alien ancestry; that over forty per cent (40%) of war production and very large majority of war shipments, material and men to active theatres of military operations went through the ports of this

military area; that the area could be attacked by surface vessels and submarines as well as by aircraft.

Executive Order No. 9066 of the President of the United States was offered, providing in part as follows:

'Authorizing the Secretary of War to Prescribe Military Areas:

Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220 and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

Now, Therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the military commanders whom he may from time to time designate, whenever he or any designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate military commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate military commander may impose in his discretion. * * *' There was introduced also in evidence by the government Public Proclamation No. 1, issued May 16, 1942, defining the areas of the Eastern Defense Command and First Army, which embraces Maine, New Hampshire, Vermont,

Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, part of the State of Florida, and The District of Columbia, are established as the Eastern Defense Command under Lieutenant-General H. A. Drum. The functional subdivisions of the Eastern Military Area is subdivided into three Corps Areas; the Third Corps Area, with headquarters at Baltimore, Maryland, embraces Pennsylvania, Maryland and Virginia. Public Proclamation No. 2, dated September 7, 1942, was introduced in evidence in which paragraph 9A provides as follows: "Any person whose presence in the Eastern Military Area or any part or zone thereof, is deemed dangerous to the national defense by the Commanding General of the Eastern Defense Command and First Army will be ordered excluded from the military area or such part or zone thereof by the Commanding General, Eastern Defense Command and First Army. * * *'

Congress by Act of March 21, 1942, provided: 'That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under authority of an executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable' to fine or imprisonment, or both.

The petitioner denied any subversive activities on her part, said she was a loyal American citizen which

was corroborated by several other witnesses and explained her part in various German clubs in which she had been active. The petitioner was at no time confronted with witnesses who gave testimony against her, nor was she represented by counsel, nor was she at any time given any specification of the charges against her upon which an order of exclusion might be founded.

The contention of the petitioner is two-fold, (1) that there was an improper delegation of legislative power by the Congress to the Commander of the Eastern Military Area in authorizing him to impose the challenged regulation, and (2) that the exclusion order was violative of the due process clause of the Fifth Amendment of the Constitution. With respect to the first contention it must now be deemed settled, since Hirabayashi v. United States, June 21, 1943, that Congress in enacting the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066 of February 19, 1942, and that in so doing there was no improper delegation of legislative power. The question then resolves itself into one, not of congressional power to delegate to the President, the promulgation of the Executive Order, but rather whether acting in cooperation, Congress and the Executive, have constitutional authority, to impose the exclusion order here complained of. In other words, decision must be made as to whether Congress and the Executive together, could leave it to the designated military commander of this area, to appraise the relevant conditions then existing, and on the basis of that appraisal say, whether under all the circumstances, the time and place were appropriate for the exclusion order. The consideration of this question concerns itself, with whether or not the order was an appro-

priate means of carrying out the executive order for the "protection against sabotage and espionage" to national defense material, premises and utilities.

By virture of his duties as Commander in Chief of the Army and Navy, it is the duty of the President and, together with Congress, jointly to see that war is successfully waged. This power is not only confined to actual engagements on fields of battle, but embraces every aspect of national defense including the protection of war materials as well as the members of the armed forces from injury and danger. In the furtherance of the successful prosecution of war, the President is properly vested with a discretion to determine whether the exigency of war requires that certain military restrictions be placed upon certain individuals. Martin v. Mott, 12 Wheat. 19. However as pointed out by Chief Justice Hughes in Sterling v. Constantin, 287 U. S. 378, 399: 'The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace.' However, it does not follow that all actions taken by the Executive are conclusive, for he further states, page 401: 'What are the allowable limits of military discretion and whether or not they have been overstepped in a particular case, are judicial questions.' As Chief Justice Taney stated in Mitchell v. Harmony, 13

How. 115, at 134, where private property in the actual theatre of war was taken to prevent its falling into the hands of the enemy: "But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.'

The position contended for by the government, is one of no ordinary magnitude and its exercise by military authorities engenders the jealousy of a free people. The statement of the court in Ex parte Milligan, 4 Wall. 2, 124, where a civilian was arrested by order of the Commanding General of an area in the State of Indiana for a war crime and tried by military tribunal and sentenced to death and where habeas corpus was allowed to obtain his release, seems to be very pertinent: 'The proposition is this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval

of the Executive, substitute force for and to the exclusion of the laws, and punish all persons. as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for if true, republican government is a failure, and there is an end of liberty regulated by law.' As has been well said when the Executive 'further directs interference with liberty or property —measures normally beyond the scope of governmental power, which are lawful if at all only because an abnormal situation has made them necessary and appropriate—it is of the very essence of the rule of laws that the executive's *ipse dixit* is not of itself conclusive of the necessity.'

While it is true that there was testimony that the area in which the petitioner resided was a sensitive one, and the center of great industrial activities closely connected with the war, and that she was a member of a number of German societies, some of which the government held to be subversive and that she had written a letter to Hitler, calling his attention to certain needs that were in her opinion requisite for the people in a certain part of Germany, which she had observed as a result of her visit there in 1931, and which letter had ended with the greeting, 'Heil Hitler,' there was not shown such a danger as would warrant denial to the petitioner of her right to due process of law. The normal civilian life of the area was being pursued; commercial and industrial activities, their tempo heightened by a demand for greater production were in private ownership; the courts both federal and state were open and functioning as well as all the administrative and executive departments of government, and it could not be honestly said that ordinary law did not adequately

secure public safety and private rights. Accordingly, it would seem to me that Congress 'cannot authorize the executive to establish by conclusive proclamation the very thing which, upon familiar principles, would have been the subject of judicial scrutiny."*

While it can be stated that the President must have a wide latitude of action when the characteristics of modern warfare are considered, mobility on land, surprise from the air and sea, treachery of sabotage and the preparation of fifth columns; and while it may be that the dictum in Ex parte Milligan, *supra,* that 'martial rule cannot arise from a threatened invasion,' must be reappraised in the light of man's ingenuity to wage modern war; and while I am not unmindful that the issuance of the proclamation by the Commander of the area is some evidence of the finding of the necessity for his assuming control of the functions of civil government, yet where there is a direct interference as here with one's liberty and property, conduct normally beyond the scope of government power, such action could only be justified, a constitutional guarantee of freedom can only be abridged, when the danger to the government is real, impending and imminent. The war power, distributed between Congress and the President, comprehends all that is requisite to wage war successfully. The proper adjustment between judicial power and administrative action, in time of war, is extremely delicate in nature and cannot admit of precise definition. Every circumstance and condition must weigh in the balance, and the true criterion will always give effect to the type and nature as well as the nearness or proximity of the danger to govern-

*Law of Martial Rule, Charles Fairman, 55 Harvard Law Review, 1272.

ment, as against the particular constitutional guaranty trespassed, whether it be of a high or low order. Suffice it to say, that the factual bases do not obtain here, which would warrant the abridgment of petitioner's constitutional rights.

A decree may be entered in conformity with this opinion."

It is our belief that the *Schueller* opinion is good law, and is a valid protection of a citizen's rights, yet leaves sufficient power in the military authorities to act within the law.

Again referring to the case of *Sterling v. Constantin,* 287 U. S. 378, at 403, we ask the indulgence of the court to permit us to repeat as follows:

"* * * The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power.' . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."

To these words we desire to add that if the military authorities are permitted by the courts to exercise the power they have assumed in this case, it will destroy our Constitution and all it has stood for since its adoption. We will then no longer be a government of law and order operating under our Constitution, but a government ruled by a dictator's decree—a decree the authority for which is delegated by the Chief Executive to some military com-

mander, permitting the military commander at his discretion, without trial or any semblance of legal right other than the decree of the Chief Executive, to seize any citizen the military commander may desire and forcibly eject such citizen from his home, destroy his business, and deprive him of every single right guaranteed to him by law and the Constitution of the United States.

If this court should permit such abuse of power and establish a precedent that the military authorities can legally exercise such an authority, who knows but what military officials, at their discretion, might make such an order against the Governor of this state, or even against the Justices of this court?

The only remedy left to this plaintiff-appellant as an American citizen, engaging in a reputable business within the State of California (and his pleadings show that only in the State of California and at his present business location could he carry on such business) was to appeal to this court for an injunction preventing the execution of said orders of the defendants-appellees from being carried out in derogation of the rights of this plaintiff-appellant promised and guaranteed to him as a citizen of the United States by the Constitution thereof.

Respectfully submitted,

LORRIN ANDREWS,
AVERY M. BLOUNT,
Attorneys for Plaintiff-Appellant.

APPENDIX.

Exhibit "A-1".

EXECUTIVE ORDER No. 9066, dated February 19, 1942, 7 F. R. 1407

AUTHORIZING THE SECRETARY OF WAR TO PRESCRIBE MILITARY AREAS

Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

Now, Therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War, or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any

region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamation of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal Troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

Exhibit "A-2".

(Copy) U. S. Exb. 4

WAR DEPARTMENT
Washington

EXTRACT

February 20, 1942

Commanding General
Western Defense Command and Fourth Army
Presidio of San Francisco, California

Dear General DeWitt:

By Executive Order, dated February 20, 1942, copy inclosed, the President authorized and directed me, through the Military Commander whom I designate, to prescribe military areas for the protection of vital installations against sabotage and espionage. The cited Executive Order also authorized and directed the administering authority to impose such restrictions upon the right to enter, remain in, or leave any such areas as may be appropriate to the requirements in each instance. Accordingly, I designate you as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command, including such changes in the prohibited and restricted areas heretofore designated by The Attorney General as you deem proper to prescribed.

****

Sincerely yours,

/s/ HENRY L. STIMSON
Secretary of War

Exhibit "A-3".

PUBLIC PROCLAMATION No. 1, 7 F. R. 2320
WAR DEPARTMENT

(Public Proclamation No. 1)

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California.

MILITARY AREAS NOS. 1 AND 2 DESIGNATED AND ESTABLISHED

March 2, 1942

To: The people within the States of Arizona, California, Oregon, and Washington, and the Public Generally.

Whereas by virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command; and

Whereas, by Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War or

the appropriate Military Commander may impose in his discretion; and

Whereas the Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

Whereas the Western Defense Command embraces the entire Pacific Coast of the United States which by its geographical location is particularly subject to attack, or attempted invasion by the armed forces of nations with which the United States is now at war; and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations;

Now, therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof as defined in Exhibit 1, hereto attached, and as generally shown on the map attached hereto and marked Exhibit 2.

2. Military Areas Nos. 1 and 2, as particularly described and generally shown hereinafter and in Exhibits 1 and 2 hereto, are hereby designated and established.

3. Within Military Areas Nos. 1 and 2 there are established Zone A-1, lying wholly within Military Area No. 1; Zones A-2 to A-99, inclusive, some of which are in Military Area No. 1, and the others in Military Area No. 2; and zone B comprising all that part of Military Area No. 1 not included within Zones A-1 to A-99, inclusive; all as more particularly described and defined and generally shown hereinafter and in Exhibits 1 and 2.

Military Area No. 2 comprises all that part of the States of Washington, Oregon, California and Arizona which is not included within Military Area No. 1, and is shown on the map (Exhibit 2) as an unshaded area.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from all of Military Area No. 1 and also from such of those zones herein described as Zones 2-A to A-99, inclusive, as are within Military Area No. 2.

Certain persons or classes of persons who are by subsequent proclamation excluded from the zones last above mentioned may be permitted, under certain regulations and restrictions to be hereafter prescribed, to enter upon or remain within Zone B.

The designation of Military Area 2 as such does not contemplate any prohibition or regulation or restriction except with respect to the zones established therein.

5. Any Japanese, German or Italian alien, or any person of Japanese Ancestry now resident in Military Area No. 1 who changes his place of habitual residence is hereby required to obtain and execute a "Change of Residence Notice" at any United States Post Office within the States of Washington, Oregon, California and Arizona. Such notice must be executed at any such Post Office not more than five nor less than one day prior to any such change of residence. Nothing contained herein shall be construed to affect the existing regulations of the U. S. Attorney General which require aliens of enemy nationalities to obtain travel permits from U. S. Attorneys and to notify the Federal Bureau of Investigation and the Commissioner of Immigration of any change in permanent address.

6. The designation of prohibited and restricted areas within the Western Defense Command by the Attorney General of the United States under the Proclamation of December 7 and 8, 1941, and the instructions, rules and regulations prescribed by him with respect to such prohibited and restricted areas, are hereby adopted and continued in full force and effect.

The duty and responsibility of the Federal Bureau of Investigation of alleged acts of espionage and sabotage are not altered by this proclamation.

J. L. DeWitt,
Lieutenant General,
U. S. Army,
Commanding.

Confirmed: J. A. Ulio
Major General, the Adjutant General
(F. R. 42-2601; Filed March 25, 1942; 11:45 A. M.)

Exhibit "A-4".

PUBLIC PROCLAMATION No. 2, 7 F. R. 2405
WAR DEPARTMENT

(Public Proclamation No. 2)

Headquarters Western Defense Command and Fourth Army Presidio of San Francisco, California

ESTABLISHMENT OF MILITARY AREAS 3, 4, 5, and 6

March 16, 1942.

Whereas by virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Utah and Arizona and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command; and

Whereas by Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any persons to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

Whereas the Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

Whereas the Western Defense Command by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations:

Now, therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones in addition to those established in Public Proclamation No. 1, this headquarters, dated March 2, 1942.

2. Pursuant to the determination and statement of military necessity in paragraph 1 hereof, there are hereby designated and established the following Military Areas:

Military Area No. 3, embracing the entire State of Idaho.

Military Area No. 4, embracing the entire State of Montana.

Military Area No. 5, embracing the entire State of Nevada.

Military Area No. 6, embracing the entire State of Utah.

3. Within Military Areas Nos. 1 and 2 as designated and established in Public Proclamation No. 1, above mentioned, and within Military Areas Nos. 3, 4, 5 and 6, as defined herein, there are hereby established, pursuant to paragraph 1 hereof, Zones A-100 to A-1033, inclusive, all as more particularly described in Exhibit 1 hereto attached, and as generally shown on the maps attached hereto and marked Exhibits 2, 3, 4, 5, 6, 7, 8 and 9.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from Zones A-100 to A-1033, inclusive.

The designation of Military Areas Nos. 3, 4, 5 and 6 as such does not contemplate any prohibition, regulation or restriction except as provided in paragraph 5 hereof.

5. Any Japanese, German or Italian alien, or any person of Japanese ancestry now resident in the States of the Western Defense Command, namely, Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, who changes his place of habitual residence is hereby required to obtain and execute a "Change of Residence Notice" at any United States Post Office within any of the states mentioned. Such notice must be executed at

any such Post Office not more than five nor less than one day prior to any such change of residence. Nothing contained herein shall be construed to affect the existing regulations of the U. S. Attorney General which require aliens of enemy nationalities to obtain travel permits from the U. S. Attorneys and to notify the Federal Bureau of Investigation and the Commissioner of Immigration of any change in permanent address.

6. The duty and responsibility of the Federal Bureau of Investigation with respect to the investigation of alleged acts of espionage and sabotage are not altered by this proclamation.

J. L. DeWitt
Lieutenant General,
U. S. Army, Commanding

Confirmed:

J. A. Ulio,
Major General,
The Adjutant General.

(F. R. Doc. 42-2673; Filed March 27, 1942; 10:29 A. M.)

Exhibit "A-5".

(Copy) U. S. Exb. 3

July 15, 1942

Dear General DeWitt:—

I refer to Executive Order of the President No. 9066, dated February 19, 1942, and to your designation as a Military Commander for the Territory of the United States embraced within Western Defense Command to carry out the duties and responsibilities imposed by the mentioned Executive Order and authorizing and empowering you to take whatever steps may be necessary to discharge these duties and responsibilities.

In order effectively to accomplish the exclusion from Military Areas of the Western Defense Command and from other similar areas, of persons whose presence therein is deemed dangerous to the National Security, you are authorized and empowered within the scope of the cited Executive Order, to prohibit any or all of such persons, that is, persons who have been excluded by you from any military area of the Western Defense Command, from entering, being in or remaining in any other Military Areas of the United States prescribed pursuant to said Executive Order, including the Eastern Military Area in Eastern Defense Command and the Military Areas of the Southern Defense Command.

Yours very truly,

HENRY L. STIMSON
Secretary of War

Lieutenant General John L. DeWitt, Commanding General,
Western Defense Command and Fourth Army
Presidio of San Francisco, California

Certified True Copy:

/s/ Hugh T. Fullerton
Hugh T. Fullerton
Major, A. G. D.,
Assistant Adjutant General.